

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

LAND CASE APPEAL NO. 66 OF 2021

(Originating from land application No. 03 of 2016 of the District Land and Housing Tribunal at Karagwe)

HOSEA ANDREA MUSHONGI (Administrator of estate of the late Hosea
Mushongi).....**APPELLANT**
VERSUS
CHARLES GABAGAMBI.....**RESPONDENT**

JUDGMENT

28th October & 5th November 2021

Kilekamajenga, J.

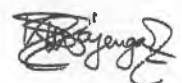
The appellant lodged the instant appeal challenging the decision of the District Land and Housing Tribunal of Karagwe. He moved this court with a memorandum of appeal containing six grounds of appeal which I take the discretion not to reproduce them in this judgment for the reasons that I will state here below. When the appeal was scheduled for hearing, both the appellant and respondent were present in person. Also, the appellant was represented by the learned advocate, Mr. Adalbert Kweyamba whereas the learned advocate, Mr. Alli Chamani appeared for the respondent. The counsel for the appellant prompted the court on the fatal irregularity observed in the proceedings of the trial court. He argued that, under section 24 of the Land Disputes Courts Act, Cap. 16 RE 2019, the tribunal chairman is supposed to solicit opinions from assessors before composing the judgment. In this case, the assessors' opinions were not solicited something which violates the law and vitiates the proceedings of the trial



tribunal. The counsel prayed for the court to quash the proceedings and set aside the decision thereof with costs.

Mr. Chamani for the respondent supported the submission from the counsel for the appellant save the prayer for costs because the irregularities were caused by the trial tribunal and not by parties.

In this case, the irregularity pointed out has affected myriad of cases arising from the District Land and Housing Tribunal. I have already stated in a number of cases and the Court of Appeal of Tanzania have reiterated in a number of cases on the essence of observing the requirement of recording assessors' opinion before the chairman of the District Land and Housing Tribunal may compose a judgment. This requirement is not a luxury that the tribunal chairman may decide to distance with rather the law obliges him or her to abide because failure to do so fatally vitiates the proceedings and the decision thereof. For academic purposes and advocating further on the need to observe the law, I take time again, at least in the upshot, to reiterate the already vast jurisprudence in this area. The composition of the District Land and Housing Tribunal cannot be fully constituted unless chaired by a chairman and not less than two assessors. **Section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216, RE 2019** provide thus:



"23 (1) The District Land and Housing Tribunal established under Section 22 shall be composed of one chairman and not less than two assessors; and

(2) The District Land and Housing Tribunal shall be dully constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment".

The above provision of the law is further emphasized in **Regulation 19 (1) and (2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003** thus:

"19 (1) The tribunal may, after receiving evidence and submissions under Regulation 14, pronounce judgment on the spot or reserve the judgment to be pronounced later;

(2) Notwithstanding sub – regulation (1) the chairman shall, before making his judgment, require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give opinion in Kiswahili".

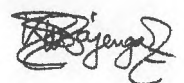
The presence of assessors during the trial was not meant to increase the number of members but ensure participatory decision making in land matters which seem to touch the community. The requirement is also meant to ensure that justice process involves the community which are stakeholders of the dispute. Assessors, who come from the community where the dispute arose, assist the chairman in reaching a judicious decision. Though the chairman is not bound with the assessors' opinion, he/she cannot opt-out the requirement of recording

their opinions before composing the judgement. Also, the departure from the assessors' opinion leads to another bounding requirement of giving sufficient reasons. For clarity, I wish to revisit **section 24 of the Land Disputes Courts Act** which provides that:

"24. In reaching decisions, the chairman shall take into account the opinion of assessors but shall not to be bound by it, except that the chairman shall in the judgment give reasons for differing with such opinion".

After the hearing of the witnesses, the chairman must schedule the case for *recording* of assessors' opinion. I decide to use the word '*record*' with the view of insisting that such opinion should appear in the proceedings. The procedure is, when an assessor is reading his/her opinion in the presence of the parties, the chairman should record such opinion. Therefore, it is not sufficient for the chairman to simply state that, the opinion of assessors recorded without writing them down in the proceedings. If such opinions do not feature in the proceedings, their acknowledgment in the judgment is not acceptable.

The Honourable Court of Appeal of Tanzania has insisted in different cases. Let me consider just a few of them: In the case of **Sikuzani Saidi Magambo and Kirioni Richard v. Mohamed Roble Civil Appeal No. 197 of 2018, CAT at Dodoma (unreported)**, Hon. Kerefu, J.A. observed that:



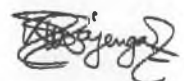
"It is also on record that, though, the opinion of the assessors were not solicited and reflected in the tribunal's proceedings, the chairperson purported to refer to them in his judgment. It is therefore our considered view that, since the record of the tribunal does not show that the assessors were accorded the opportunity to give the said opinion, it is not clear as to how and at what stage the said opinion found their way in the tribunal's judgment. It is also our further view that, the said opinion was not availed and read in the presence of the parties before the said judgment was composed".

Furthermore, a similar situation occurred in the case of **Ameir Mbarak and Azania Bank Corp. Ltd v. Edgar Kahwili, Civil Appeal No. 154 of 2015 (unreported)** and the Court of Appeal of Tanzania had the following to say:

"Therefore, in our own considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the chairman in the judgment. In the circumstances, we are of a considered view that, assessors did not give any opinion for consideration in the preparation of the tribunal's judgment and this was a serious irregularity."

Similarly, in the land mark case of **Tubone Mwambeta v. Mbeya City Council, Civil Appeal No. 287 of 2017, CAT at Mbeya (unreported)**. The Court of Appeal of Tanzania reiterated the above stance of the law. In that case Hon. Mugasha, JA further insisted that:

"...Such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the chairman in the final verdict."



The Court of Appeal further stated that:

*"...the involvement of assessors is crucial in the adjudication of land disputes because apart from constituting the tribunal, it embraces giving their opinions before the determination of the dispute. As such, **their opinion must be on record.**"* (emphasis added).

See also, the cases of **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil appeal No. 286 of 2017, CAT at Mbeya (unreported); **General Manager Kiwengwa stand Hotel v. Abdallah Said Mussa**, Civil Appeal No. 13 of 2012; **Y. S. Chawalla and Co. Ltd v. DR. Abbas Teherali**, Civil Appeal No. 70 of 2017.

Based on the directions given in the above cases, and for the guidance to the District Land and Housing Tribunal, the practice ought to be as follows: after the closure of the defence case, the chairman must schedule the case for assessors' opinions. On the date fixed for assessors' opinion, the proceedings, for instance, should read as follows:

Date: 10th August 2021

Coram: S. J. Mashaka – Chairman

T/c: Magoma

Members: T. J. Kashisha and J. N. Ndoma

Applicant: Present in person

Respondent: Present in person



Tribunal: The case is coming for assessors' opinion.

Applicant: I am ready for the opinion

Respondent: I am ready too.

Assessors' opinions:

1st assessor – T. J. Kashisha:

Maoni yangu ni kwamba.....

.....

2nd assessor – J. N. Ndoma:

Katika kesi hii maoni yangu.....

.....

Tribunal:

Assessors' opinion read before the Tribunal in the presence of the parties.

Order: Judgment on 20th August, 2021

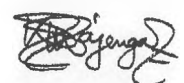
Sgd: S. J. Mashaka

Chairman

10th August, 2021

Thereafter, the chairman may compose the judgment.

In the case at hand, the record shows that, on 02nd August 2018, the chairman gave the following order:



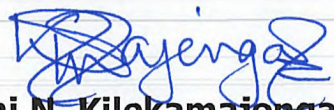
Order: Judgment on 28/9/2018, assessors (**CHAMANI & AKWILINA**) to adduce opinions.

The above order was the end of the proceedings of the District Land and Housing Tribunal. The record does not show whether assessors' opinions were given and neither does the proceedings show whether the judgment was delivered. Failure to solicit opinions from assessors was a fatal irregularity that vitiated the proceedings. I hereby quash the proceedings and set aside the decision of the trial tribunal. I further order the retrial of the case before another chairman and a new set of assessors. No order as to costs. It is so ordered.

DATED at BUKOBA this 5th day of November, 2021.




Court:


Ntemi N. Kilekamajenga.
JUDGE
05/11/2021

Judgment delivered in the absence of the parties this 05th November 2021.




Ntemi N. Kilekamajenga.
JUDGE
05/11/2021

